A

GAN BOON AUN v. PP

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
ZAINUN ALI FCJ
AZAHAR MOHAMED FCJ
B ZAHARAH IBRAHIM FCJ
AZIAH ALI FCJ
[CRIMINAL APPEAL NO: 05-217-10-2015 (W)]
24 JUNE 2016
[2016] (JT11)

C

CRIMINAL PROCEDURE: *Appeal – Appeal to Federal Court – Appeal against decision of Court of Appeal hearing a criminal appeal from High Court – Whether decision of High Court not a decision in exercise of its original, appellate or revisionary jurisdiction – Whether Court of Appeal had no jurisdiction to hear*
D *appeal – Whether consequently not a competent appeal before the Federal Court – Courts of Judicature Act 1964 ss. 30, 50, 84 – Federal Constitution art. 128 – Rules of the Federal Court 1995 rr. 30-39*

JURISDICTION: *High Court – Referral from subordinate court – Referral of question of law as to the effect of the provision of the Federal Constitution – Duty,*
E *power and jurisdiction of High Court Judge – Whether could decide on constitutionality of matter thus transmitted – Whether could enlarge jurisdiction as given by statutes – Whether could only stay proceeding, state question of law that had arisen in the form of a special case and transmit same to Federal Court – Courts of Judicature Act 1964 ss. 30, 50, 84 – Federal Constitution art. 128 – Rules of the*
F *Federal Court 1995 rr. 30-39*

STATUTORY INTERPRETATION: *Construction of statutes – Literal approach – Intention of Legislature – Sections 30 & 84 Courts of Judicature Act 1964 – Reference from subordinate court to High Court on question of law as to the effect of the provision of the Federal Constitution – Jurisdiction and power to decide on*
G *constitutionality of matter under reference – Whether with the High Court – Whether exclusively vested with the Federal Court – Courts of Judicature Act 1964 ss. 30, 50, 84 – Federal Constitution art. 128 – Rules of the Federal Court 1995 rr. 30-39*

H The Sessions Court herein, while hearing a criminal matter before it, remitted a question of law arising from the case as to the effect of the provision of the Federal Constitution ('Constitution') to the High Court for a determination pursuant to s. 30 of the Courts of Judicature Act 1964 ('CJA'). The question posed, in pith and substance, pertained to the constitutionality of s. 122(1) of the Securities Industry Act 1983 ('the Act'),
I with which the appellant and another accused stood charged before the court. The High Court Judge, upon considering the referral, ruled that s. 122(1) of the Act was unconstitutional and void, and in consequence acquitted and discharged both the accused. The Public Prosecutor appealed

whereupon the Court of Appeal, ruling that s. 122(1) of the Act was valid, overturned the decision of the High Court. The appellant appealed to the Federal Court, whereof, at the outset of the hearing, the learned justices herein, upon considering the factual matrix of the appeal, and the relevant provisions of the Constitution, the CJA and Rules of the Federal Court 1995 ('RFC 1995'), took the liberty to pose, and answer, the following questions of law, namely; (i) whether the High Court, upon a constitutional issue being referred to it by a subordinate court under s. 30 of the CJA, could decide on the constitutional issue and answer the questions thus referred to it; (ii) whether the present appeal was properly brought before the Federal Court; and (iii) whether the High Court was correct in making the order of acquittal and discharge.

Held (striking out appeal; setting aside decisions of courts below; remitting case back to High Court)
Per Zulkefli Ahmad Makinudin CJ (Malaya) delivering the judgment of the court:

(1) Under s. 30 of the CJA, the High Court Judge has to consider and decide whether there is a question of constitutional issue on matters referred to it by the Sessions Court necessary for the determination of the proceedings before the Sessions Court. If there is none, the High Court Judge must send back the case for continued hearing before the Sessions Court. On the other hand, if the High Court finds that a decision as to the effect of a provision of the Constitution is necessary for the determination of the proceedings in the Sessions Court, it is the duty of the High Court Judge under s. 84 of the CJA to state the question in the form of a special case which shall permit of an answer being given in the affirmative or negative. Once that is done, the High Court Judge shall transmit the special case to the Federal Court in accordance with the RFC 1995. (para 21)

(2) Nowhere in ss. 30 and 84 of the CJA is power given to the High Court Judge to determine a question which concerns the effect of a provision of the Constitution which had arisen in the subordinate court and in respect of which the record of proceedings have been transmitted to the High Court by the subordinate court under s. 30 of the CJA. That power clearly belongs to the Federal Court. (para 22)

(3) Both ss. 30(3) and 84(4) of the CJA make reference to Part XI of the RFC 1995 entitled 'Special Constitutional Case' which contains specific provisions as in rr. 31 to 39 to deal with reference under ss. 30 and 84 of the CJA. It is to be noted that r. 31 of the RFC 1995 is substantially similarly worded as in s. 30(1) and (2) of the CJA, and likewise, rr. 32(1) and (2) read with r. 33(1) and (2) thereof are substantially similarly worded as in the provision of s. 84 of the CJA. Reading the provisions of ss. 30 and 84 of the CJA together with the relevant provisions of the

RFC 1995, it is clear that it is the intention of the Legislature that the jurisdiction and power is vested with the Federal Court to decide on the constitutionality of any matter that had arisen in the subordinate court and transmitted to the High Court. The High Court does not have the jurisdiction and power to decide on such constitutional issue. It only has the power to decide on such issue if the issue arises for the first time before itself. (paras 23, 24 & 32)

(4) The literal approach of interpretation should be adopted for the provisions of ss. 30 and 84 of the CJA. By such interpretation, it is clear that the power or duty of the High Court Judge is confined to considering whether the decision as to the effect of a provision of the Constitution is necessary for the determination of the proceeding in the subordinate court, and to state the question which in his opinion has thus arisen in the form of a special case which, so far as possible, shall state the question in a form which shall permit of an answer being given in the affirmative or negative and transmitting the same to the Federal Court for determination. It is to be noted, in this respect, that the High Court, being a creature of statute, has no power to enlarge its jurisdiction under ss. 30(2) and 84(1) of the CJA. (paras 27 & 28)

(5) In dealing with the application under ss. 30 and 84 of the CJA, the provision of art. 128(2) of the Constitution is worth noting. Upon the clear words of art. 128(2), only the Federal Court has the jurisdiction to determine a question as to the effect of any provision of the Constitution for which the record of proceedings has been transmitted to the High Court by a subordinate court. It is also to be noted that, whilst art. 128(2) states that the Federal Court shall have jurisdiction 'subject to any rules of Court regulating the exercise of such jurisdiction', the relevant rules are the rules as provided for under the RFC 1995. It follows that the High Court does not have the power or duty to determine a question as to the effect of a provision of the Constitution when the record of proceedings of the Sessions Court is transmitted to the High Court under s. 30 of the CJA. (paras 29 & 30)

(6) The High Court Judge was wrong in law to have acquitted and discharged the accused. The learned judge was not empowered to do so, as she was not deciding the case before her by way of a criminal appeal or a criminal reference as provided for under the Criminal Procedure Code. (para 34)

(7) Under s. 50(1) of the CJA, the Court of Appeal in respect of criminal appeals shall have jurisdiction to hear and determine any appeal against any decision made by the High Court: (i) in the exercise of its original jurisdiction; and (ii) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court. In the present appeal, the High Court did not try the alleged

offence committed by the appellant in the exercise of its original jurisdiction as the appellant was charged at the Sessions Court. The High Court also did not exercise its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court as the Sessions Court merely referred the question to the High Court under s. 30 of the CJA. It is clear therefore that the Court of Appeal did not have the jurisdiction to hear the respondent's appeal against the decision of the High Court. It follows that the present appeal was not competent and not properly brought before this court. (paras 17, 18, 19 & 35)

(8) The matter here is remitted back to the High Court with the order that the High Court Judge shall consider and state, if any, the question which in his or her opinion has arisen as to the effect of the provision of the Constitution in the form of a special case which so far as may be possible shall state the question in a form which shall permit of an answer being given in the affirmative or the negative, and transmit the same to the Federal Court for determination pursuant to s. 84(3) of the CJA. (para 35)

Obiter:

Sessions Court Judges and Magistrates when dealing with any application by any party under s. 30 of the CJA must properly ensure that there is merit in such application. It may be just a frivolous application to delay the conduct of the hearing of the trial. Likewise, High Court judges, when presiding to deal with matters brought before them under s. 30 of the CJA, should decide promptly and judiciously whether there is merit in such application.

***Bahasa Malaysia** Headnotes*

Mahkamah Sesyen dalam kes ini, sewaktu mendengar satu kes jenayah di hadapannya, telah merujuk satu persoalan undang-undang yang berbangkit dalam kes tersebut yang berkaitan dengan kesan suatu peruntukan Perlembagaan Persekutuan ('Perlembagaan') ke Mahkamah Tinggi untuk satu keputusan di bawah s. 30 Akta Mahkamah Kehakiman 1964 ('AMK'). Persoalan yang dikemukakan, pada hakikatnya, merujuk kepada keperlembagaan s. 122(1) Akta Industri Sekuriti 1983 ('Akta'), di bawah mana perayu dan seorang lagi telah dituduh di mahkamah. Hakim Mahkamah Tinggi, setelah menimbang rujukan, memutuskan bahawa s. 122(1) Akta adalah sah dan dengan itu telah melepas dan membebaskan kedua-dua tertuduh. Pendakwa Raya merayu dan berikutnya Mahkamah Rayuan mengetepikan keputusan Mahkamah Tinggi sekaligus memutuskan bahawa s. 122(1) Akta adalah sah. Perayu merayu ke Mahkamah Persekutuan, dan berikutan itu, yang arif hakim-hakim di sini, setelah meneliti fakta-fakta rayuan, serta peruntukan-peruntukan relevan Perlembagaan, AMK dan Kaedah-Kaedah Mahkamah Persekutuan 1995

A ('KKMP 1995'), telah mengambil inisiatif sendiri untuk mengemukakan, dan menjawab, persoalan undang-undang berikut, iaitu: (i) sama ada Mahkamah Tinggi, atas isu keperlembagaan yang dirujuk oleh mahkamah bawahan kepadanya di bawah s. 30 AMK, boleh membuat keputusan atas isu tersebut dan menjawab persoalan yang dikemukakan; (ii) sama ada rayuan semasa di
B bawa ke hadapan Mahkamah Persekutuan dengan teratur; dan (iii) sama ada Mahkamah Tinggi betul dalam membuat perintah pelepasan dan pembebasan.

Diputuskan (membatalkan rayuan; mengetepikan keputusan mahkamah-mahkamah di bawah; mengembalikan kes ke Mahkamah Tinggi)

C **Oleh Zulkefli Ahmad Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:**

(1) Di bawah s. 30 AMK, Hakim Makamah Tinggi wajar menimbang dan memutuskan sama ada terdapat persoalan mengenai isu keperlembagaan dalam halperkara yang dirujukkan kepadanya oleh Mahkamah Sesyen
D yang dikirakan perlu bagi memutuskan prosiding di hadapan Mahkamah Sesyen tersebut. Jika persoalan tersebut tidak wujud, Hakim Mahkamah Tinggi hendaklah mengembalikan kes untuk disambung bicara di hadapan Mahkamah Sesyen. Sebaliknya, jika Mahkamah Tinggi mendapati bahawa keputusannya mengenai kesan suatu peruntukan
E Perlembagaan adalah perlu bagi maksud memutuskan prosiding di hadapan Mahkamah Sesyen, maka menjadi tanggungjawab Hakim Mahkamah Tinggi di bawah s. 84 AMK untuk menyatakan persoalan tersebut dalam suatu kes khas dan dalam bentuk yang membolehkan satu jawapan berbentuk afirmatif atau negatif diberi. Sebaik itu dilakukan,
F Hakim Mahkamah Tinggi hendaklah mengangkat kes khas tersebut ke Mahkamah Persekutuan selaras dengan peruntukan KKMP 1995.

(2) Tiada apapun di dalam ss. 30 dan 84 AMK di mana kuasa diberi kepada Mahkamah Tinggi untuk memutuskan persoalan mengenai kesan suatu peruntukan Perlembagaan yang berbangkit di mahkamah bawahan dan
G berkaitan mana rekod prosiding yang telah dihantar ke Mahkamah Tinggi oleh mahkamah bawahan di bawah s. 30 AMK. Kuasa tersebut adalah jelas milik Mahkamah Persekutuan.

(3) Kedua-dua ss. 30(3) and 84(4) AMK membuat rujukan kepada Bahagian XI KKMP 1995 di bawah tajuk 'Kes Perlembagaan Khas' yang
H mengandungi peruntukan khusus seperti yang terdapat di kk. 31 hingga 39 bagi menangani rujukan di bawah ss. 30 dan 84 AMK. Perlu diperhatikan bahawa k. 31 KKMP 1995 menggunakan tatabahasa yang amat menyamai tatabahasa s. 30(1) dan (2) AMK, dan begitu juga, kk. 31(1) dan (2) dibaca bersama k. 33(1) dan (2) menggunakan
I tatabahasa yang amat menyerupai tatabahasa peruntukan s. 84 AMK. Membaca peruntukan-peruntukan ss. 30 dan 84 AMK bersama dengan

peruntukan-peruntukan relevan KKMP 1995, jelas bahawa adalah menjadi niat Badan Perundangan bahawa bidang kuasa dan kuasa adalah diletak pada Mahkamah Persekutuan untuk memutuskan mengenai keperlembagaan sebarang halperkara yang berbangkit di mahkamah bawahan yang dirujuk ke Mahkamah Tinggi. Mahkamah Tinggi tiada bidang kuasa atau kuasa untuk memutuskan isu keperlembagaan tersebut. Ia hanya mempunyai kuasa untuk berbuat demikian jika isu tersebut berbangkit buat pertama kali di hadapannya.

(4) Pendekatan pentakrifan literal harus diguna pakai terhadap peruntukan-peruntukan ss. 30 dan 84 AMK. Berdasarkan pentafsiran ini, jelas bahawa kuasa ataupun tanggungjawab Hakim Mahkamah Tinggi adalah terhad setakat menimbang sama ada keputusan mengenai kesan suatu peruntukan Perlembagaan adalah perlu bagi maksud memutuskan prosiding di mahkamah bawahan, dan menyatakan persoalan yang pada pandangannya telah berbangkit itu dalam suatu kes khas yang mana, sedapat yang boleh, harus pula menyatakan persoalan tersebut dalam bentuk yang membolehkan satu jawapan berbentuk afirmatif atau negatif diberi, dan kemudian mengangkatnya ke Mahkamah Persekutuan untuk keputusan. Harus diingat bahawa, dalam perkara ini, Mahkamah Tinggi, sebagai ciptaan statut, tiada kuasa untuk meluaskan bidang kuasanya di bawah ss. 30(2) dan 84(1) AMK.

(5) Dalam menangani permohonan di bawah ss. 30 dan 84 AMK, peruntukan per. 128(2) Perlembagaan wajar diambil perhatian. Berdasarkan peruntukan jelas per. 128(2), hanya Mahkamah Persekutuan mempunyai bidang kuasa untuk memutuskan persoalan mengenai kesan sesuatu peruntukan Perlembagaan di mana rekod prosiding telah dihantar ke Mahkamah Tinggi oleh mahkamah bawahan. Harus juga diperhatikan bahawa walaupun fasal 128(2) ada menyebut bahawa bidang kuasa Mahkamah Persekutuan adalah 'tertakluk kepada mana-mana kaedah Mahkamah yang mengawal selia bidang kuasa berkenaan', kaedah yang relevan adalah KKMP 1995. Ianya mengikut bahawa Mahkamah Tinggi tidak mempunyai kuasa atau tanggungjawab untuk memutuskan persoalan mengenai kesan suatu peruntukan Perlembagaan apabila rekod prosiding Mahkamah Sesyen diangkat ke Mahkamah Tinggi di bawah s. 30 AMK.

(6) Hakim Mahkamah Tinggi khilaf di sisi undang-undang apabila melepas dan membebaskan tertuduh. Yang arif hakim tidak mempunyai kuasa untuk berbuat demikian kerana kes di hadapannya itu bukanlah kes rayuan atau rujukan jenayah seperti yang diperuntukkan di bawah Kanun Tatacara Jenayah.

(7) Di bawah s. 50(1) AMK, berkaitan dengan rayuan jenayah, Mahkamah Rayuan mempunyai bidang kuasa untuk mendengar apa-apa rayuan terhadap keputusan yang dibuat oleh Mahkamah Tinggi: (i) dalam

melaksanakan bidang kuasa asalnya; dan (ii) dalam melaksanakan bidang kuasa rayuan atau semakannya berkaitan mana-mana keputusan yang dibuat oleh Mahkamah Sesyen. Dalam rayuan di sini, Mahkamah Tinggi, apabila membicara kesalahan yang dikata dilakukan perayu, bukan melaksanakan bidang kuasa asalnya kerana perayu dipertuduh di Mahkamah Sesyen. Begitu juga, Mahkamah Tinggi tidak melaksanakan bidang kuasa rayuan atau semakan berkaitan hal perkara jenayah yang diputuskan oleh Mahkamah Sesyen, kerana Mahkamah Sesyen hanya merujuk satu persoalan ke Mahkamah Tinggi di bawah s. 30 AMK. Oleh yang demikian, jelas bahawa Mahkamah Rayuan tidak mempunyai bidang kuasa untuk mendengar rayuan responden terhadap keputusan Mahkamah Tinggi. Ianya mengikut bahawa rayuan semasa adalah tidak berkompeten dan tidak dibawa dengan secara teratur ke mahkamah ini.

(8) Hal perkara dikembalikan ke Mahkamah Tinggi dengan perintah bahawa Hakim Mahkamah Tinggi hendaklah meneliti dan menyatakan persoalan, jika ada, yang pada pandangan beliau telah berbangkit berkaitan kesan suatu peruntukan Perlembagaan dalam bentuk kes khas yang mana, setakat yang boleh, hendaklah pula menyatakan persoalan tersebut dalam bentuk yang membolehkan satu jawapan afirmatif atau negatif diberi, dan mengangkatnya ke Mahkamah Persekutuan untuk keputusan di bawah s. 84(3) AMK.

Obiter:

Hakim-hakim Mahkamah Sesyen dan Majistret-majistret bilamana menangani permohonan yang dibuat oleh satu pihak di bawah s. 30 AMK hendaklah memastikan bahawa permohonan sedemikian adalah bermerit. Permohonan tersebut mungkin hanya satu helah untuk melengahkan perjalanan perbicaraan. Begitu juga, hakim-hakim Mahkamah Tinggi apabila mendengar halperkara di bawah s. 30 AMK yang dibawa ke hadapan mereka hendaklah bertindak memutuskan dengan cepat dan saksama sama ada terdapat merit pada permohonan sedemikian.

Case(s) referred to:

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***
Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***
Gerald Fernandez v. Attorney-General, Malaysia [1970] 1 LNS 27 FC ***(refd)***
Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 30(1), (2), (3), 48, 50(1), 84(1), (3), (4)
Federal Constitution, arts. 4(4), 5(1), 7(2), 8(1), 128(2)
Rules of the Federal Court 1995, rr. 31, 32(1), (2), 33(1), (2), 34, 35, 36, 37, 38, 39
Securities Industry Act 1983, s. 122(1)

For the appellant - Tan Hock Chuan, K Kumaraendran, Cheah Sin Chin, Cains Tan & Lee Wenxu; M/s Tan Hock Chuan & Co
For the respondent - Manoj Kurup, Shanti Geoffrey, Mohd Hafiz Mohd Yusoff & Munira Masood; DPPs, AG's Chambers

[Editor's note: For the Court of Appeal judgment, please see PP v. Gan Boon Aun [2015] 9 CLJ 328 (set aside).]

Reported by Wan Sharif Ahmad

JUDGMENT

Zulkefli Ahmad Makinudin CJ (Malaya):

Background Facts

[1] The appellant together with another accused person, Khiudin bin Mohd were charged before the Sessions Court in Kuala Lumpur and the charges are as follows:

> Principal Charge
>
> That you between 28 February 2006 to 15 February 2007, at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, abetted Transmile Group Berhad (Company No. 373741 - W) in making a statement that is misleading in a material particular in Transmile Group Berhad's 'Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006' and the misleading statement is underlined in red in the Appendix to this charge, and the said statement is likely to induce the purchase of securities of Transmile Group Berhad by other persons, and when the statement is misleading in a material particular, and you have thereby committed an offence under section 86(b) read together with section 122C(c) of the Securities Industry Act 1983 (Act 280) and punishable under section 88B of the same Act.
>
> Alternative Charge
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> That Transmile Group Berhad (Company No. 373741-W) between 14 February 2007 and 15 February 2007 at Bursa Malaysia Securities Berhad, Exchange Square, Bukit Kewangan 50200 Kuala Lumpur, in the Federal Territory of Kuala Lumpur, has committed an offence under section 122B(a)(bb) of the Securities Industry Act 1983 (Act 280) when it, with intent to deceive, furnished a misleading statement to Bursa Malaysia Securities Berhad in Transmile Group Berhad's 'Quarterly Report On Unaudited Consolidated Results For The Financial Year Ended 31 December 2006' and the misleading statement is underlined in red in the Appendix to this Charge and that you, who at the time of the commission of the offence was a director of Transmile Group Berhad, are deemed to have committed an offence under section 122B(a)(bb) read together with section 122(1) of the Securities Industry Act 1983, and punishable under section 122B of the same Act.

[2] On 16 March 2011, the Sessions Court Judge held that the prosecution had proved a *prima facie* case and ordered them to enter on their defence to the alternative charge.

[3] On 21 June 2011, before the commencement of the defence case, an application was made by the appellant and Khiudin bin Mohd for a referral of a constitutional question to the High Court under s. 30 of the Courts of Judicature Act 1964 ("CJA"). The Sessions Court thereafter transmitted the case to the High Court under the said s. 30 of the CJA.

[4] The High Court, on 14 November 2011, declared s. 122(1) of the Securities Industry Act 1983 ("the Act") to be unconstitutional on the basis that it is completely inconsistent with the fundamental right of an accused person to be presumed innocent until proven guilty as provided in art. 5(1) of the Federal Constitution.

[5] In her written grounds of judgment, the learned High Court Judge *inter alia* held as follows:

(a) That s. 122(1) of the Act be and is hereby declared unconstitutional and void as being in violation of the right to a fair trial because s. 122(1) of the Act completely abrogates the fundamental right of an accused person to be presumed innocent until proven guilty, as a result, s. 122(1) of the Act therefore violates arts. 5(1) and 8(1) of the Federal Constitution;

(b) That s. 122(1) of the Act be and is hereby declared unconstitutional and void as being in violation of the right to a fair trial because s. 122(1) of the Act completely abrogates the fundamental right that a criminal charge must be proved by the prosecution against the accused beyond reasonable doubt, as a result, s. 122(1) of the Act therefore violates arts. 5(1) and 8(1) of the Federal Constitution;

(c) That the arbitrary and indiscriminate use of s. 122(1) of the Act in this case is in violation of the fundamental rights of both accused guaranteed under arts. 5(1) and 8(1) of the Federal Constitution and must be struck down as unconstitutional;

(d) That s. 122(1) of the Act violates the doctrine of separation powers as enshrined in the Federal Constitution and unconstitutional and void;

(e) That the continued prosecution of both accused under the alternative charge after his acquittal on the principal charge is unconstitutional because it is being done in violation of art. 7(2) of the Federal Constitution;

(f) That both accused be hereby acquitted and discharged on the alternative charge; and

(g) That the declaration of this court that s. 122(1) of the Act is unconstitutional and therefore, void, takes effect prospectively from the date of this judgment in order not to render invalid the prosecutions which have been instituted by the Public Prosecutor in other cases under s. 122(1) of the Act.

[6] The respondent lodged an appeal to the Court of Appeal on 16 November 2011. On 28 September 2015, the Court of Appeal overturned the decision of the High Court and held s. 122(1) of the Act to be valid. On the application of the appellant, the Court of Appeal granted a stay of its decision pending an appeal to this court. The appellant had on 7 October 2015 filed an appeal against the decision of the Court of Appeal.

[7] At the outset of the hearing of the appeal before this court, we posed questions to both parties and invited learned counsel for the appellant and the learned Deputy Public Prosecutor ("DPP") for the respondent to address us on the following questions:

(i) whether the High Court, upon a constitutional issue being referred to by the subordinate court, by virtue of s. 30(1) of the CJA, was correct in deciding on the constitutional issue and answering the questions referred to it;

(ii) whether the present appeal is properly brought before the Federal Court; and

(iii) whether the High Court was correct in making the order of acquittal and discharge of the accused persons as stated in the grounds of judgment.

Submissions Of The Appellant

[8] Learned counsel for the appellant submitted amongst others that under s. 84 of the CJA the duty of the High Court Judge is confined to staying the proceedings and stating the question which in the opinion of the High Court Judge had arisen as to the effect of the provision of the Constitution in the form of a special case which shall permit of an answer being given in the affirmative or the negative. Once that is done the High Court Judge shall transmit the special case to the Federal Court in accordance with the Rules of Court of the Federal Court.

[9] For the appellant it was further submitted that ss. 30(3) and 84(4) of the CJA make reference to the Rules of Court of the Federal Court and Part XI of the Rules of the Federal Court 1995 ("RFC 1995") entitled "Special Constitutional Case" contained specific provisions to deal with references under ss. 30 and 84 of the CJA. The relevant rules are rr. 31, 32, 33 and 34 of the RFC 1995.

[10] It was the appellant's case that the present appeal was not properly brought before this court as the High Court Judge had no power to determine a question as to the effect of a provision of the Constitution under s. 30 of the CJA. The High Court Judge should have transmitted the question in the form of a special case to the Federal Court for its determination. In a reference under ss. 30 and 84 of the CJA, the Court of Appeal has no jurisdiction or power to determine any appeal from the High Court.

A **Submissions Of The Respondent**

[11] It was the contention of the respondent that the High Court was correct in deciding on a constitutional issue and answering the questions referred to it and the present appeal is therefore properly brought before this court. Learned DPP in support of the respondent's contention submitted that we should look at the legislative history of s. 84 of the CJA. Section 84 in its original form existed in s. 48 of the CJA which has been repealed where the said provision was couched in mandatory terms. The then s. 48 of the CJA provided as follows:

> Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution, the Judge hearing such proceeding **shall** stay the same on such terms as may be just to await the decision of such question by the Federal Court. (emphasis added)

[12] Learned DPP further submitted, however, in 1964 the CJA was amended leading to the substitution of the word "may" for the word "shall" in s. 48 of the CJA. Section 84 of the CJA in its present form which reflects the amendment reads as follows:

> 84. (1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.
>
> (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
>
> (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
>
> (4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

[13] Learned DPP also invited this court to consider the reasons for introducing the changes to this provision as set out in the Parliamentary Hansards dated 16 October 1964 introducing the amendments to the CJA in 1964 which are set out below:

> The combined effect of section 30 and section 48 of the Act, as they stand, is to deprive the High Court or any subordinate Court of Jurisdiction to decide any question as to the effect of any provision in the

> Constitution which arises in any proceedings before it. Any such question existing under the provisions must, therefore, be referred to the Federal Court for decision. *These provisions Mr. Speaker, Sir, conflict with the provisions of Article 128(2) of the Constitution, which confer jurisdiction, but not however, exclusive jurisdiction on the Federal Court to decide such constitutional questions arising in the proceedings in other Courts.*
>
> *The Bill now seeks to remedy the position by giving a discretion to the High Court or the subordinate Court to refer any such question to the Federal Court. Section 30 requires reference to be made by a subordinate Court to the High Court which, in turn, under section 48, transmits the question to the Federal Court. Article 128(2) of the Constitution provides that the exercise of the jurisdiction of the Federal Court should be subject to any rules of court regulating that jurisdiction, and it is advisable to treat the provisions of section 30 in this respect as rules of court. …* (emphasis added)

[14] For the respondent it was submitted that it was evident from the Hansards above that Parliament had intended to provide the High Court and even the subordinate courts with the jurisdiction to decide any question as to the effect of any provision in the Constitution which arises in any proceedings before such courts. It is trite that courts are entitled to consider the Hansards when deciding a case, a principle enunciated by the Federal Court in the case of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701; [2004] 2 MLJ 257.

[15] Learned DPP highlighted to us the significance of the amendments to the then s. 48 of the CJA which was dealt with in the case of *Gerald Fernandez v. Attorney-General, Malaysia* [1970] 1 LNS 27; [1970] 1 MLJ 262. In *Gerald Fernandez*, the plaintiff had sought for rulings which would have the effect of freeing him from the liability of being surrendered to the Singapore authorities where he was facing charges for corruption. At the High Court, the learned Chief Justice had declined to entertain certain questions on the constitutionality of the Commonwealth Fugitive Criminals (Amendment) Act 1969 on the basis of his reasoning that the High Court had no jurisdiction to hear the matter by virtue of art. 4(4) of the Federal Constitution. On appeal in holding otherwise, Suffian FJ in delivering the decision of the Federal Court stated at p. 264 as follows:

> With respect, I think the learned Chief Justice was in error in thinking that he had no jurisdiction. This is not a proceeding for a declaration that the Commonwealth Fugitive Criminals (Amendment) Act, 1969, is invalid on the ground mentioned in clause (3) (namely because Parliament was not competent to enact it), but on the ground that it was inconsistent with Article 7(1) which reads:
>
> > No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

It was competent of the High Court to give a ruling on this question. Probably the learned Chief Justice was misled by being referred to an unamended copy of section 48(1) of the Courts of Judicature Act No. 7 of 1964 which originally read:

> Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the judge hearing such proceedings **shall** stay the same on such terms as may be just to await the decision of such question by the Federal Court.

*Note well the mandatory word underlined. The appellant's solicitors in their written submission to us repeated the above text, but the word **'shall'** has been amended by Act No. 35 of 1964 to read **'may'**. So it is quite plain that the High Court has jurisdiction. But even without the amendment the High Court would be competent to give a ruling on this question, for the original text of section 48(1) of the Courts of Judicature Act was clearly inconsistent with the Constitution, the general scheme of which is to empower the High Court (subject to certain restrictions) to pronounce on the constitutionality of Federal and State laws.* (emphasis added)

Decision Of This Court

[16] We shall first deal with the second question posed by us as to whether the present appeal is properly brought before this court from the decision of the Court of Appeal.

[17] It is our considered view that the Court of Appeal did not have the jurisdiction to hear the respondent's appeal against the decision of the High Court given on 14 November 2011 in view of the provision of ss. 30 and 84 of the CJA. In the present case the Sessions Court referred to the High Court under s. 30 of CJA on the constitutionality of s. 122(1) of the Act. The High Court declared s. 122(1) of the Act unconstitutional and void. The Court of Appeal allowed the prosecution's appeal and ordered the said decision of the High Court be set aside.

[18] It is to be noted that under s. 50(1) of the CJA the Court of Appeal in respect of criminal appeals shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:

(a) In the exercise of its original jurisdiction; and

(b) In the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

[19] In the present appeal the High Court did not try the alleged offence committed by the appellant in the exercise of its original jurisdiction as the appellant was charged at the Sessions Court. The High Court also did not exercise its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court as the Sessions Court merely referred the question to the High Court under s. 30 of the CJA.

[20] We shall now deal with the first question posed by us as to whether the High Court upon a constitutional issue being referred to it by the Sessions Court under s. 30 of the CJA was correct in deciding on the constitutional

issue and answering the questions referred to it. We are of the view the provisions of ss. 30 and 84 of the CJA on this issue are clear. Those sections provide as follows:

> Reference of constitutional question by subordinate court
>
> 30. (1) Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court [may] stay the proceedings and [may] transmit the record thereof to the High Court.
>
> (2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.
>
> (3) Subsections (1) and (2) shall be deemed to be rules of court for the purposes of Article 128(2) of the Constitution.
>
> Reference of constitutional question by High Court
>
> 84. (1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.
>
> (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
>
> (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
>
> (4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

[21] We would take the view that under s. 30 of the CJA the High Court Judge has to consider and decide whether there is a question of constitutional issue on matters referred to it by the Sessions Court necessary for the determination of the proceedings before the Sessions Court. If there is none the High Court Judge must send the case back for continued hearing before the Sessions Court. On the other hand if the High Court finds that a decision

on a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings in the Sessions Court it is the duty of the High Court Judge under s. 84 to state the question which in the opinion of the High Court Judge had arisen as to the effect of the provision of the Constitution in the form of a special case which shall permit of an answer being given in the affirmative or the negative. Once that is done, the High Court Judge shall transmit the special case to the Federal Court in accordance with the Rules of Court of the Federal Court.

[22] It is to be stated here that nowhere in ss. 30 and 84 of the CJA is power given to the High Court Judge to determine a question which concerns the effect of a provision of the Constitution which had arisen in the subordinate court and in respect of which the record of proceedings have been transmitted to the High Court by the subordinate court under s. 30 of the CJA. That power belongs to the Federal Court.

[23] As regards the application of the provisions of ss. 30 and 84 of the CJA it is important to note that both ss. 30(3) and 84(4) of the CJA make reference to the Rules of Court of the Federal Court which is in Part XI of the RFC 1995 entitled "Special Constitutional Case" which contain specific provisions as in rr. 31 to 39 to deal with a reference under ss. 30 and 84 of the CJA. Rule 31 of the RFC 1995 reads as follows:

> Reference by subordinate court
>
> 30. (1) Where in any proceedings in any court subordinate to a High Court a question rises as to the effect of any provision of the Constitution the presiding officer of such Court shall forthwith stay the proceedings and shall send the record thereof the Registrar of the High Court.
>
> (2) On the receipt of any record of proceedings under this rule the Registrar of the High Court shall lay the same before a Judge of the High Court.
>
> (3) On consideration of any record of proceedings as is herein mentioned where a Judge considers that the decision of a question as to the effect of any provision of the Constitution is necessary for the determination of such proceedings the Judge shall deal with the case as if it were a case before him in the original jurisdiction of the High Court in which such a question has arisen.

It can be readily seen that r. 31 of the RFC 1995 is substantially similarly worded as in s. 30(1) and (2) of the CJA.

Rules 32 and 33 of the RFC 1995 are reproduced in full as follows:

> Reference by High Court
>
> 32. (1) Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution the Judge hearing such proceedings may make an order on such terms as may be just staying such proceedings to await the decision of such question by the Federal Court.

(2) An order staying proceedings under this rule may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may consider most suitable having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final disposal of the proceedings.

Special case

33. (1) Where an order for stay of proceedings has been made under rule 32 the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case for the opinion of the Federal Court.

(2) The question which has arisen shall be stated in a form which shall permit of an answer being given in the affirmative or the negative.

(3) Every special case stated under the Rule shall be divided into paragraphs and shall concisely state such facts and shall include such documents as may be necessary to enable the Court to decide the question raised thereby and shall be signed by the Judge.

Again it is to be noted that r. 32(1) and (2) read with r. 33(1) and (2) of the RFC 1995 are substantially similarly worded as in the provision of s. 84 of the CJA.

[24] It is our considered view that it is plainly obvious that the Legislature has intended to empower only the Federal Court to determine a question as to the effect of any provision of the Constitution in a reference under s. 30 of the CJA. The High Court does not have such power.

[25] It is also noted that r. 33(3) of the RFC 1995 provides that every special case stated under the rule shall be divided into paragraphs and shall concisely state such facts and shall include such documents as may be necessary to enable the court to decide the question raised thereby and shall be signed by the judge. The use of the word "shall" suggests that this requirement is mandatory.

[26] It is further noted that rr. 34, 35, 36, 37 and 38 under Part XI of the RFC 1995 entitled "Special Constitutional Case" contained specific provisions on the mode of dealing with the said special cases.

[27] We would state here that it is trite that where the words of the statutory provision are clear and unambiguous, a court should give effect to its plain meaning. A court should not read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (See the Supreme Court case of *Vengadasalam v. Khor Soon Weng & Ors* [1985] 1 LNS 46; [1985] 2 MLJ 449). We are of the view that the literal approach of interpretation should be adopted for the provisions of s. 30 and s. 84 of the CJA where it is clear that the power or duty of the High Court

Judge is confined to considering whether the decision as to the effect of a provision of the Constitution is necessary for the determination of the proceedings in the subordinate court and to state the question which in his/her opinion has arisen as to the effect of the provision of the Constitution in the form of a special case which so far as may be possible shall state the question in a form which shall permit of an answer being given in the affirmative or the negative and transmitting the same to the Federal Court for determination.

[28] It is our considered view that the High Court, being a creature of statute, has no power to enlarge its jurisdiction under s. 30(2) and s. 84(1) of the CJA. On this point we would refer to the case of *Dr Koay Cheng Boon v. Majlis Perubatan Malaysia* [2012] 4 CLJ 445; [2012] 3 MLJ 173 where the Federal Court had this to say:

> [52] Being a creature of statute, the Court of Appeal has no power to enlarge its jurisdiction. Since the decision of the High Court under section 31(2) of the Act is final, the Court of Appeal has no power to enlarge its jurisdiction by hearing such an appeal. Such an appeal before that court would be incompetent. For the aforesaid reasons I would hold that the decision of the Court of Appeal in the instant appeal, *viz.* that it did not have the jurisdiction to hear the appeal by the appellant is correct. The Court of Appeal properly appreciated the applicable law to arrive at a judicious decision.

[29] In dealing with the application of the provisions of ss. 30 and 84 of the CJA, it is worth noting the provision of art. 128(2) of the Federal Constitution which confers jurisdiction on the Federal Court to determine a question as to the effect of any provision of the Constitution. Article 128(2) of the Federal Constitution clearly provides that without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of the Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

[30] Based on the clear provision of art. 128(2) of the Federal Constitution, we are of the view only the Federal Court has the jurisdiction to determine a question as to the effect of any provision of the Constitution for which the record of proceedings has been transmitted to the High Court by a subordinate court. It is noted that under art. 128(2) of the Federal Constitution itself it is mentioned that the Federal Court shall have jurisdiction "subject to any rules of Court regulating the exercise of that jurisdiction". The rules of court in this context are the relevant rules as provided for under RFC 1995 as earlier referred to in our judgment. The High Court Judge does not have the power or duty to determine a question

as to the effect of a provision of the Constitution when the record of proceedings of the Sessions Court is transmitted to the High Court under s. 30 of the CJA.

[31] Learned DPP in his submission impressed upon us to consider the legislative history of s. 84 of the CJA in its original form in s. 48 of the CJA before this s. 48 was repealed. Learned DPP also referred to us the Parliamentary Hansards dated 16 October 1964 to consider the reasons for introducing the changes to the provision in s. 84 of the CJA. The case of *Gerald Fernandez v. Attorney-General of Malaysia* (*supra*) was cited to show that with the amendment the High Court has the jurisdiction and power to pronounce on the constitutionality of Federal and State laws.

[32] With respect we are not persuaded by the argument put forward by the learned DPP that the High Court is competent to decide and rule on the constitutionality of any matter transmitted to it by a subordinate court. It is clear now reading the provisions of ss. 30 and 84 of the CJA together with the relevant provisions of the RFC 1995 that it is the intention of the Legislature that the jurisdiction and power is vested with the Federal Court to decide on the constitutionality of any matter that had arisen in the subordinate court and transmitted to the High Court. The High Court does not have the jurisdiction and power to decide on such constitutional issue. It only has the power to decide on such issue if the issue arises for the first time before itself.

[33] We would like to state here and advise all Sessions Court Judges and Magistrates when dealing with any application made by any party under s. 30 of the CJA to properly ensure that there is merit in such application. It may be just a frivolous application to delay the conduct of the hearing of the trial. If there is no merit in such application the case should proceed to a final conclusion of the trial. A trial should be conducted on a continuous basis without interruption and delay. A trial should not be by instalment. Likewise, High Court Judges when presiding to deal with matters brought before them under s. 30 of the CJA should act and decide promptly and judiciously whether there is merit in such application. If the matter referred to it does not relate to constitutional issue to be determined by the Federal Court, it should be sent back to the transmitting court for speedy disposal of the case.

[34] We shall finally deal with the third question posed as to whether the High Court was correct in making the order of acquittal and discharge against the appellant after deciding on the constitutional issue and answering the questions referred to it under s. 30 of the CJA. Our straight answer to this question is that the High Court Judge was clearly wrong in law to have acted in the way she did as she was not empowered to do so. As a judge she was not deciding the case before her by way of a criminal appeal or a criminal reference as provided for under the Criminal Procedure Code.

A

Conclusion

[35] For the reasons abovestated it is our decision that the appeal before this court is incompetent. We therefore strike out the appeal. We make an order that the decisions of the High Court dated 14 November 2011 and of the Court of Appeal dated 28 September 2015 be both set aside. The matter is to be remitted back to the High Court with the order that the High Court Judge shall consider, if any, and state the question, which in his/her opinion has arisen as to the effect of the provision of the Constitution in the form of a special case which so far as may be possible shall state the question in a form which shall permit of an answer being given in the affirmative or the negative and transmit the same to the Federal Court for determination pursuant to s. 84(3) and (4) of the CJA.

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